The Hecla Press : : New York City
39

No. 11,310

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WESTMINSTER SCHOOL DISTRICT OF ORANGE COUNTY, et al.,
Appellants,

vs.

GONZALO MENDEZ, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

Respectfully submitted,

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Pursuant to leave granted by this court, The American Jewish Congress is submitting a brief herein as *amicus curiae*.

In the three decades of its existence the American Jewish Congress, on frequent occasions, has represented the democratic interests of the Jewish people before the courts, legislatures and administrative tribunals of the State and Federal Government. Its work, however, has never been confined to the interests of the Jewish people alone. We believe, indeed, that the Jewish interests are inseparable from those of justice and that Jewish interests are threatened whenever persecution, discrimination or humiliation is inflicted upon any human being because of his race, creed, color, language or ancestry.

Nor do we struggle for minorities alone. We are convinced that the treatment of minorities in a community is indicative of its political and moral standards and ultimately determinative of the happiness of all its members. In arguing here in favor of the rights of one ethnic group we are certain to serve the interests of all Americans.

Statement of the Case

Gonzalo Mendez, et al., the appellees, as citizens of the United States and on behalf of their minor children and some 5,000 persons similarly affected, all of Mexican or Latin descent, filed a class suit pursuant to Rule 23 of Federal Rules of Civil Procedure in the District Court of the United States for the Southern District of California against the appellants, the Westminster Garden Grove and El Modeno School Districts and the Santa Ana Schools, all of Orange County, California, and the respective trustees and superintendents of these Districts. The appellees' petition, based upon the Fourteenth Amendment to the Constitution of the United States and Subdivision Fourteen, Section 24 of the Judicial Code (Title 28, Section 41, subdivision 14, U. S. C. A.), alleged (1) that the appellants had adopted and enforced certain regulations which prohibited children of Mexican or Latin descent or extraction from attending certain schools in the respective districts, (2) segregated and required them to attend schools reserved exclusively for children or persons of Mexican and Latin descent, and (3) that such regulations and usages resulted in a denial of the equal protection of the laws in violation of the Fourteenth Amendment. The petition demanded that the regulations and usages be declared unconstitutional and that the appellants be enjoined from further application thereof.

Upon trial of the issues before the United States District Court, Judge Paul J. McCormick rendered judgment against the appellants on the ground that the "pattern of public education promulgated in the Constitution of California and effectuated by provisions of the Education Code of the State, prohibits segregation of the pupils of Mexican ancestry in the elementary schools." The Court also held that the segregation practices of the appellants' school districts show "a clear purpose to arbitrarily discriminate against the pupils of Mexican ancestry and to deny them the equal protection of the laws", and were therefore a violation of the Fourteenth Amendment to the Constitution of the United States.

Scope of the Brief

The present brief is being filed after the presentation of the briefs of the appellants, of the appellees, and of the National Association for the Advancement of Colored People as friend of the Court. To avoid duplication, we shall confine ourselves to the discussion of three additional points listed below.

We should like, however, to emphasize that we fully agree with the main point made and documented by the National Association for the Advancement of Colored People to the effect that, as long as racial segregation prevails, no equality or even physical facilities is in fact possible: If the facilities were really duplicated, financial ruin of the local bodies of the states would ensue. If financial disaster is to be avoided, the facilities granted to minorities are bound to be physically inferior.

For the purposes of this brief, however, we shall proceed on the assumption that the physical facilities furnished to the appellees are identical to those furnished to the English-speaking group. Our argument based on this assumption divides itself into three main points:

POINT ONE

Whenever a group, considered as "inferior" by the prevailing standards of a community, is segregated by official action from the socially dominant group, the very fact of official segregation, whether or not "equal" physical facilities are

being furnished to both groups, is a humiliating and discriminatory denial of equality to the group considered "inferior" and a violation of the Constitution of the United States and of treaties duly entered into under its authority.

POINT TWO

Whenever inhabitants of the United States are classified, for purposes of official action, according to their race, color, creed, national origin or ancestry, whether or not such classification is based on discriminatory social or legal notions of "inferiority" or "superiority" of the various groups, the very fact of official differentiation according to racial, religious or national criteria is an unreasonable and inadmissible classification and a violation of the Constitution of the United States and of treaties entered into under its authority.

POINT THREE

Segregation by official action of a state or its subdivisions of children of a more recent-immigrant foreign language group from children of less recent-immigrant English-speaking groups of Americans is inconsistent with the basic purposes, policies and provisions of the immigration and naturalization laws of the United States and therefore an unconstitutional interference with a valid Federal regulation.

ARGUMENT

POINT ONE

Whenever a group, considered as "inferior" by the prevailing standards of a community, is segregated by official action from the socially dominant group, the very fact of official segregation, whether or not "equal" physical facilities are being furnished to both groups, is a humiliating and discriminatory denial of equality to the group considered "inferior" and a violation of the Constitution of the United States and of treaties duly entered into under its authority.

1. It is not disputed that the furnishing by an official body of inferior physical facilities to any given ethnic

group would represent an unlawful and discriminatory denial of equality to such group. *Plessy* v. *Ferguson,* 163 U. S. 537 (1896).

2. Mere identity of physical facilities, however, does not necessarily amount to equality either in the economic, political or legal sense. (The law would not recognize, for example, that an estate has been divided *equally* between two children each receiving one of the two identical houses comprising the estate, if one of the houses were located in a busy banking district and the other fifty miles from the nearest railroad station. Nor would a probate court accept the division as *equal* even if the two identical houses were located on the same street, opposite each other, but if, for some known or unknown, valid or invalid reason, one side of that street were fashionable and sought-after, the other neglected and rejected.) Equality is indeed determined, in fact and in law, not by the physical identity of things assigned in ownership use or enjoyment, but by identity or substantial similarity of their *values.*

In their turn, values do not depend solely or even primarily on the physical properties of things or facilities to be valued but also on the "social location" of these things or facilities, on their social significance and psychological context or in short, on the community judgment attached to them.

The recognition of these legal principles of evaluation is not confined to the field of property. Law is no more blind to realities when political or civil rights are involved than when it deals with real estate or chattel. American law demands, in the enjoyment by persons of government-furnished facilities, an equality not less real and substantial than the one it exacts for the protection of heirs, partners or stockholders. In calling for "equal protection", or for "equal facilities", or for the "outlawing of discrimination", the Constitution and the laws of the United States call for genuine equality of protection and not for a merely formal or physical identity of treatment.

3. It is a well known fact that the value and desirability of many objects, facilities, traits or characteristics may depend not so much upon their intrinsic qualities or defects, advantages or shortcomings as upon their association with, or use by persons enjoying a certain reputation. The value of a mediocre type of fabric may be enhanced by an *arbiter elegantiarum* wearing it, the desirability of a beautiful resort may be lessened by its being visited by people deemed of "low" social standing. If a group considered "inferior" by the prevailing community sentiment adopts any given color of garment, accent of speech, or place of amusement, that color, accent or place will automatically be shunned by the majority and become less desirable or valuable.

These are, however, phenomena of social stratification productive of *social* inequality against which the law offers no direct remedy.

4. The same depreciation may take place, however, not because of spontaneous adoption of certain places, styles or objects by a group deemed "inferior" but because of their imposition by the community, organized or otherwise.

If the Nazis while proclaiming the essential inferiority of the "Jewish race", compelled Jews to wear clothes of one given color while reserving another to the master race, it could not be said that Jews have received equal clothing facilities even if the physical qualities of the clothing were identical to those given to the members of the Aryan race. Nor would the discriminatory and humiliating character of the measure depend on whether the colors were brown for the Jews and black for the others, or vice-versa. It is the exclusive allocation of a given color, of *any* color, to a race declared "inferior" that makes the color less desirable. The inferiority thus transmitted from the wearer to the garment destroys the genuine "equality" of the furnished facilities.

Similarly, it could hardly be disputed that an act of a legislature or of a school board expressly declaring that a given group is "inferior" and therefore to be confined to

separate parks, schools or halls is discriminatory and therefore unconstitutional.

This result would be reached not because such act expresses an opinion of inferiority or superiority (the mere expression of an opinion may very well not be within the concept of state *action,* see *Brandeis J.* in *Standard Computing Scale Co.* v. *Farrel,* 249 U. S. 571, 1919), but because discriminatory *action* has followed discriminatory *opinion.* The official assignment to a group of separate parks, schools or halls based on an officially stated conviction of the group's inferiority would be an assignment of facilities *inferior per se,* regardless of their physical identity with the facilities assigned to the "better" group.

The situation as here described could not be characterized as merely *social* inequality. We may assume that social inequality has antedated the enactment of the assumed statute or regulation. But a legislative or administrative declaration of that pre-existing social inferiority and the ensuing action of assignment of facilities, inferior because segregated, amounts to the creation of a *legally sanctioned* political inequality.

5. This result does not vary when, in the now described chain of (1) pre-existing social inequality; (2) legislative declaration thereof and (3) assignment of separate, and hence inferior, facilities, the intermediate link, i.e., the overt finding of inferiority, is omitted. Official action will not be allowed to accomplish by indirection what it may not achieve openly. *Poindexter* v. *Greenhow,* 114 U. S. 270, 295 (1884); *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373 (1886); *Gwinn* v. *United States,* 238 U. S. 347, 364 (1915); *Myers* v. *Anderson,* 238 U. S. 368 (1915); *Neal* v. *Delaware,* 103 U. S. 370 (1881).

The failure of a statute or regulation expressly to declare a legal inferiority does not protect it from the scrutiny of the courts. When the reasonableness of a legislative classification is in question the courts will look behind the apparent classification to determine the real intent of the

law and whether or not, in fact, an illegal classification has been made. *Henderson* v. *Mayor,* 92 U. S. 259, 268 (1875); *Bailey* v. *Alabama,* 219 U. S. 219, 244 (1911); *Penn Coal Co.* v. *Mahon,* 260 U. S. 393, 413 (1922). Thus, in *Yick Wo* v. *Hopkins, supra,* the Court declared (p. 373): "Though the law be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Any classification adopted by a governmental body as the basis of official action must be viewed not in the abstract but realistically in the social setting in which it operates. The judge "must open his eyes to all those conditions and circumstances * * * in the light of which reasonableness is to be measured * * *. In ascertaining whether challenged action is reasonable, the traditional common-law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken." Harlan F. Stone in 50 Harvard Law Review, pp. 4, 24 (1936). See also *Poindexter* v. *Greenhow, supra; Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 387-388 (1926); *Connor* v. *Board of Commissioners of Logan County, Ohio,* 12 F. (2d) 789, 795 (1926). Furthermore, the Supreme Court has declared that while generally it will not inquire into the motives which led to the enactment of State regulation, yet "where the facts as to the situation and the conditions are such as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance." *Dobbins* v. *Los Angeles,* 195 U. S. 223, 240 (1904).

It should be pointed out here that in those States which have enacted Civil Rights statutes entitling all citizens and residents to full and equal public accommodations, the separation of persons in a public place is generally deemed

to be a discrimination. It has been held in such States that separation founded on race or color alone can be justified only on the ground that the Negro is inferior to the white and that such separation would do violence to equality before the law. In these cases segregation is synonymous with discrimination. *Ferguson* v. *Gies,* 83 Mich. 358, 46 N. W. 718, 720 (1890); *Bolden* v. *Grand Rapids Operating Co.,* 239 Mich. 318, 214 N. W. 241, 243 (1927); *Jones* v. *Kehrlein,* 49 Cal. App. 646, 194 P. 55 (1920); *Donnell* v. *State,* 48 Miss. 661 (1873); *Joyner* v. *Moore-Wiggins Co., Ltd.,* 152 App. Div. 266, 136 N. Y. S. 578 (1912); *Crosswaith* v. *Bergin,* 95 Colo. 241, 35 P. (2d) 848 (1934); *Randall* v. *Cowlitz Amusements,* 194 Wash. 92, 76 P. (2d) 1017 (1938); *Anderson* v. *Pantages Theatre Co.,* 114 Wash. 24, 194 P. 813 (1921); *Wysinger* v. *Crookshank,* 82 Cal. 588, 23 P. 54 (1890).

Segregation of school facilities according to national ancestry has no independent rational justification and no other relation to the purpose of the law than that to be found in a community feeling of the respective superiority and inferiority of the two ethnic groups. Official adoption of social classifications based on such feelings of necessity implies the adoption of the meaning inherent in, and inseparable from the classifications themselves, that of the respective inferiority and superiority of the groups. It may be doubted whether or not law should take affirmative steps to eliminate social inequality. But it seems certain that law may not adopt, sanction and enforce it. Whenever law adopts a social classification based on a notion of inferiority it transforms the pre-existing *social* inequality into *legal* inequality. What ensues is official discrimination, a denial of equality before the law, whether or not the statement of inferiority is made openly by the government or inheres in the classification upon which official action is based.

6. Once a social classification based on group inferiority is "adopted" by the law, the ensuing legal inferiority will in its turn intensify and deepen the social inequality from

which it stems. Law is, indeed, at the same time the consequence and the cause of social phenomena. In no other field is this truth more apparent than in that of ethnic relations. The undeniable effect of classification by race, color or ethnic origin has been to enforce an inferior economic and social status upon the non-white minority. The actual operation of segregation statutes illustrates this oppressive function of the law. It is well known, for instance, that the doctrine of "separate but equal" facilities has proved to be a mere legal fiction in most cases, that invariably segregation has been accompanied by gross discrimination, and that absolute equality seldom, if ever, exists.[1]

[1] Gunnar Myrdal, *An American Dilemma* (New York, 1944), pp. 580-581: "When the federal Civil Rights Bill of 1875 was declared unconstitutional, the Reconstruction Amendments to the Constitution—which provided that Negroes are * * * entitled to 'equal benefit of all laws' * * * could not be so easily disposed of. The Southern whites, therefore, in passing their various segregation laws to legalize social discrimination, had to manufacture a legal fiction of the same type as we have already met in the preceding discussion on politics and justice. The legal term for this trick in the social field, expressed or implied in most of the Jim Crow statutes is 'separate but equal'. That is, Negroes were to get equal accommodations, but separate from the whites. It is evident, however, and rarely denied, that there is practically no single instance of segregation in the South which has not been utilized for a significant discrimination. The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the obvious example of how segregation is an excuse for discrimination."

Charles S. Johnson, *Patterns of Segregation* (New York, 1943), p. 4: "It is obvious that the policy of segregation which the American system of values proposes, merely to separate and to maintain two distinct but substantially equal worlds, is a difficult ideal to achieve. Any limitation of free competition inevitably imposes unequal burdens and confers unequal advantages. Thus, segregation or any other distinction that is imposed from without almost invariably involves some element of social discrimination as we have defined it."

p. 318: "The laws prescribing racial segregation are based upon the assumption that racial minorities can be segregated under conditions that are legally valid if not discriminating. Theoretically, segregation is merely the separate but equal treatment of equals. In such a complex and open society as our own, this is, of course, neither possible nor intended; for whereas the general principle of social regulation and selection is based upon individual competition, special group segregation within the broad social framework must be effected artificially and by the imposition of arbitrary restraints. The result is that there can be no group segregation without discrimination, and discrimination is neither democratic nor Christian."

For a study of segregation and discrimination see Charles S. Mangum, Jr., *The Legal Status of the Negro* (Chapel Hill, 1940); Charles S. Johnson, *Patterns of Negro Segregation* (New York, 1943); Myrdal, *op. cit.*, Part VIII.

The great disparity in the funds expended upon white and colored schools respectively by those Southern states which enforce segregation,[2] the one-sided enforcement of segregation laws and the inferiority of public accommodations reserved for Negroes,[3] the wage differentials and other economic inequalities between the races,[4] the segregated slum areas in which Negroes are forced to live,[5] the neglect of their social needs or complete denial of public services, and the other innumerable burdens and deprivations impressed upon the Negro minority by the oppressive mechanism of segregation,[6] all furnish overwhelming testimony that the system of legal separation based upon race was never intended to and can have no other result than one of increasing, through the sanction of the law, that social and economic inferiority in which the law itself originated.

[2] For documentation of educational inequalities growing out of segregated schools, see NAACP brief *amicus curiae* filed in this case. See also Johnson, *op. cit.*, p. 12ff; Charles S. Mangum, Jr., *op. cit.*, pp. 129-137.

[3] Myrdal, *op. cit.*, pp. 576-577: "The sanctions which enforce the rules of segregation and discrimination also will be found to be one-sided in their application. They are applied by the whites to the Negroes, never by the Negroes to the whites. The laws are written upon the pretext of equality but are applied only against the Negroes."

[4] Johnson, *op. cit.*, p. 90: "An important distinction is preserved, particularly in the South, between wages for white and Negro workers. This wage differential is taken for granted because of the difference in the types of work done in the past. * * * Wage differences are now so well established in custom that they are frequently maintained where work is identical, with the conviction that this is necessary to preserve the superior social status of the white worker."

See also Myrdal, *op. cit.*, p. 391; Richard Sterner, *The Negro's Share* (New York, 1943).

[5] Myrdal, *op. cit.*, p. 618ff; see also St. Clare Drake and Horace R. Cayton, *Black Metropolis* (New York, 1945).

[6] Myrdal, *op. cit.*, pp. 642-643: "The fact that social segregation involves a substantial element of discrimination will add its influence to this vicious cycle. Negroes are given adequate education, health, protection, and hospitalization; they are segregated in districts where public services of water provision, sewage, and garbage removal, street cleaning, street lighting, paving, police protection and everything else is neglected or withheld while vice is often allowed. All this must keep the Negro masses inferior and provide reasons for further discriminating in politics, justice and breadwinning. * * * The very existence of the heavy mechanism of social segregation and discrimination makes inequalities in politics and justice more possible and seemingly unjustifiable on grounds of inferiority."

This situation involves at the same time another kind of vicious circularity. The now described effect of segregation laws makes their spontaneous repeal or amendment a practical impossibility. When a more or less inarticulate social feeling of racial superiority is clothed with the dignity of an official law, that feeling acquires a concreteness and assertiveness which it did not possess before. The stricter the law or discriminatory segregation the stronger and the more articulate the feeling of social distance. And the stronger that feeling, the stricter the law and the more difficult its amendment or repeal. In such setting the very roots of democratic processes are threatened and no reliance can be placed on their correcting effect. It is this type of situation which Chief Justice Stone had in mind when, in sustaining the constitutionality of an economic measure, he warned that the decision did not foreclose the question whether "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation" and whether "similar considerations enter into review of statutes directed at particular religious, * * * or national * * * or racial minorities, * * * whether prejudice against discrete and insular minorities may be a special condition, which lends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products,* 304 U. S. 144, 153 (1938). The importance of Stone's theory of political restraints has been stressed in Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases,* 41 Columbia L. Rev. 1160, 1176 (1941); See, *The Supreme Court of the United States During the October Term 1942,* 43 Columbia L. Rev. 837, 938 (1943); Wechsler, *Stone and the Constitution,* 46 Columbia L. Rev. 765, 795 (1946).

The true function of law, in a constitutional form of government, is to guide society towards higher forms of co-existence rather than to follow the less worthy attitudes of a community. The people of the United States have established a constitution in order to ensure that all government officials will find in the permanent dictates of decency a defense against the transient whims or prejudices of a local or national majority. When, on the contrary, governmental officials follow the lowest level of community thinking, they betray their function of political leadership. Where prejudice is legalized, where bigotry is given official sanction, where prestige of law is lent to bias, there ignorance, narrow-mindness and hatred assert themselves openly, and operate *as of right.* An official action, born in and based on a discriminatory classification, breeds in turn more inequality and more prejudice. The vicious circle can be broken only if the courts exercise the power which the Constitution has vested in them for the protection of the basic values of our society.

7. Every one of the preceding remarks acquires particular significance and singular strength when applied to segregation of facilities available for the education of children. Indeed:

a. The value and the desirability of an educational institution is particularly dependent on intangible elements. The physical characteristics of the benches and desks of a school shrink into utter insignificance when compared with the social and psychological environment which the school offers to its children.

b. Children are more impressionable and are more impressed than adults by the implied environmental judgments of superiority and inferiority. Those deemed superior are often, in manifesting their innocent pride, more cruel than normal adults usually are. On the other side, children who feel that they are treated as inferior are more bitterly humiliated by the social stigma that strikes them than adults can be.

c. The children's acceptance of the reasonableness of official action is often less critical than that of adults. On the other hand, once their respect for community judgments is shaken, their denial of community values is equally sweeping.

d. The official imposition of a segregated pattern based on notions of inferiority and superiority produces its deepest and most lasting social and psychological evil results when applied to children.

Authorities agree that feelings of racial superiority or inferiority are not innate in any child but are instilled in him by adults or by his observation of institutions about him.[7] Since segregation reinforces group isolation and social distance it helps to create conditions in which unhealthy racial attitudes may flourish. By giving official sanction to group separation based upon the assumption of inferiority it helps to perpetuate racial prejudice and contributes to the degradation and humiliation of the minority child.[8] The crippling psychological effects of

[7] See Bruno Lasker, *Race Attitude in Children* (New York, 1929), p. 48: "In social settlements, race distinctinos are often made because they are taken for granted by the directors, not because they are especially desired by the children. There are many mentions of both long-established and recent mixed clubs in the reports of settlements where these have been allowed to grow up."
p. 197: "* * * the playground may also * * * be the occasion of the child's first experience of race separation and the arena of his first active part in racial conflict. Surveys made in a number of cities have shown that the public playground often introduced into the life of the child who has mixed with children of another race in school the first consciousness of a social distinction between the two groups. Just because its contacts are voluntary, adult opinion forces a recognition of prevailing social discriminations."

[8] See statements by the following authorities as to the effects of segregation on Negro and Mexican children:

Caroline F. Ware, "The Role of the Schools in Education for Racial Understanding", Journal of Negro Education, Vol. XIII, No. 3, pp. 421-431, at p. 424: "A segregated school system presents almost insuperable obstacles. In such a system, the racial situation may be made worse by vicious attitudes, or mitigated by sympathetic ones. But the sheer fact of segregation stands as an external reminder to every white child, every day, that the Negro or Mexican children are being kept away from his school. And the children of racial minorities are reminded, daily, that they are outcasts. In each is bred the habit of distance and of stereotype thinking. Each learns either not to see the other as they pass on the way to school, or to see and dismiss from attention. * * *"

such segregation are in essence a denial of equality of treatment. In this sense segregation is burdensome and oppressive and comes within the constitutional prohibition.

In this connection great weight should be given to the finding of the court below in the instant case:

> "The evidence clearly shows that Spanish-speaking children are retarded in their learning English by lack of exposure to its use because of segregation, and that commingling of the entire student body instills and

[8] (Cont'd)

Robert R. Moton, *What the Negro Thinks* (Garden City, N. Y., 1929), p. 113: "Always the objectionable corollary of inferiority accompanies the separate school. However attractive may be the provisions for colored children, those in authority see to it that the provisions for white children are better, and such discriminations will obtain all through the system. And of all things Negroes resent most are these persistent, insidious implications of inferiority."

E. Franklin Frazier, *Negro Youth At the Crossways* (1940), p. 290: "The * * * pathological feature of the Negro community is of a more general character and grows out of the fact that the Negro is kept behind the walls of segregation and is in an artificial situation in which inferior standards of excellence or efficiency are set up. Since the Negro is not required to compete in the larger world and to assume its responsibilities, he does not have an opportunity to mature."

Howard Hale Long, "Psychogenic Hazards of Segregated Education of Negroes", The Journal of Negro Education, Vol. IV, No. 3, July, 1935, p. 343: "The total setting of the segregated school literally forces a sense of limitation upon the child. He is reminded of it whether in home, school, theatre, or in the streets. If he wishes to earn some extra pennies after school, or if he becomes occupation-conscious, he meets the problem. For him the symptoms of unavoidable limitation are as ubiquitous as the air he breathes. Our best guess is that the high rate of delinquency among Negroes is directly related to this phenomenon of isolation, or absence of wholesome goals. How early and to what extent, the child senses the situation we do not know. We do know that the Negro is in a competition with great odds against him. Competition is at its best when there is a reasonabe chance of success. The colored citizen is surrounded by a highly organized social and economic structure in which he is not allowed to compete on equal terms with his fellows. Knowledge and experience of the inner workings of the mechanisms are not shared with him; they are preempted by others. If he knocks at the door of opportunity, he is usually denied on grounds contrary to pronounced ethical and democratic ideals. Segregated education both foreshadows and insures coming events."

For an intensive study of the problems of Negro youth because of segregation and discrimination see series prepared for the American Youth Commission: Ira DeA. Reid, *In a Minor Key* (1940); Allison Davis and John Dollard, *Children of Bondage* (1940); E. Franklin Frazier, *Negro Youth at the Crossways* (1940); Charles S. Johnson, *Growing Up in the Black Belt* (1941); Vincent J. Davis, Donald W. Wyatt and J. Howell Atwood, *This Be Their Destiny* (1941); Robert L. Sutherland, *Color, Class and Personality* (1942).

See also, Charles S. Johnson, *Patterns of Segregation* (1943), Pt. II, "Behavioral Response of Negroes to Segregation and Discrimination".

develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals. It is also established by the record that the methods of segregation prevalent in the defendant schools foster antagonisms in the children and suggest inferiority among them where none exists."[9]

8. The record of the instant case clearly shows that the segregation of children of Mexican or Latin descent in the Westminster School District of Orange County was based on the prejudiced feeling that these children were inferior to those of the Anglo-Saxon group. The clear significance of the assignment of separate facilities to them was therefore in the social context in which official actions must be judged, a discriminatory and humiliating assignment of facilities which were "equal", if at all, only in their physical aspects.

[9] See also, Ruth D. Tuck, *Not With the Fist.* A Study of Mexican-Americans in a Southwest City (New York, 1946). Miss Tuck observes:

"Descano [the Southwestern City] for many years has proceeded to 'untrain' large numbers of its little citizens for democratic living. By setting up a segregated school system, it not only untrained Juan Perez's children but it untrained the small descendants of pioneers. The lessons each group, sequestered from the other, learned were those nicely calculated to nurture stereotyped thinking, prejudice, fear and friction" (p. 184).

"The child (of Mexican descent) who spends ten years of his school life in a segregated system emerges speaking accented English for the rest of his life. Learning a language is essentially a social process. If a language is spoken only in the classroom, it will not be well learned; and no amount of authoritarian pressure can keep a child from speaking the language of his home on the playground, if he is among others of his own group only. Actually, children with a fair command of English have lost it, after transfer into a segregated school. More serious, however, is the one-sided development, the ignorance of life outside one's own group, which results from segregation" (pp. 186-187).

"The reason usually advanced for segregation is that of linguistic difficulty. It seems a queer one to advance in a country which has educated millions of second-generation children, speaking all sorts of foreign tongues, without recourse to segregation. The Catholic parochial schools in the Southwest have, for decades, educated little Irish-Americans and Italian-Americans and Mexican-Americans, side by side without segregation or 'opportunity' rooms, either one. The linguistic adaptability of children is tremendous, as anyone can testify. But the secret of that adaptability lies in constant opportunity for practice, before vocal patterns are set and self-consciousness arises. It might be added that, in the segregation process, no use was made of special techniques adapted to bilingual children, a procedure which might have constituted the only justification" (p. 187).

Superintendent Kent asserted that the Mexican children are "dirty", have lice; impetigo; generally dirty hands, face, neck, ears, and are inferior to the white races in the matter of personal hygiene (R. Tr. pp. 116, 121). He admitted that "on account of cleanliness" the children of Mexican descent have been segregated (R. Tr. p. 88).

9. It is a matter of common knowledge, of which many courts have already taken judicial notice, that measures of segregation against Negroes, Mexicans, Chinese and other minority groups or colored races are due to and predicated solely upon the social notions of national, racial or religious inferiority and superiority.[10]

Mr. Gunnar Myrdal, social scientist, in his exhaustive two-volume study of Negro-white relationships in the United States, *An American Dilemma,* has described these mores (p. 100):

"In the magical sphere of the white man's mind, the Negro is inferior, totally independent of rational proofs or disproofs. And he is inferior in a deep and mystical sense. The 'reality' of his inferiority is the white man's own indubitable sensing of it, and that feeling applies to every single Negro * * * the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and *dangerous*—dangerous to the white man's virtue and social order."

Segregation of this type may be described as a form of partial ostracism[11] and its motivation has become the pro-

[10] Carey McWilliams, "Race Discrimination and the Law", Science and Society, Volume IX, Number 1, Winter 1945: "Systematic discrimination against a racial minority usually assumes the form of segregation. The subordinate status of the group may, in fact, be inferred from the modes of segregation to which it is subjected. Segregation is of two general types: passive segregation based on custom and tradition; and active segregation, that is, legally sanctioned segregation. The latter type presents the problem of racial discrimination with entire clarity from the standpoint of the minority group, since it officially imputes an essential inferiority to those segregated."

[11] Charles S. Johnson, *Patterns of Negro Segregation* (New York, 1943), p. 3.

tection of a dominant culture from the threat of an "inferior" culture.[12] Through a variety of complex patterns and social controls it reinforces and guarantees the inferior status of the minority group isolated, and in turn the inferior status becomes a justification for a belief in the inherent inferiority of this group and the wisdom of enforcing segregation.[13]

Professor D. O. McGovney has said in a recent article appearing in California Law Review:[14]

> "When a dominant race, whether white or Negro, demands separation, it is fallacious to say * * * that the intention and effect is not to impose a 'badge of inferiority' on the other. When a Negro workingman or woman is seated in the third seat of a street car on St. Charles Avenue in New Orleans and a white man or woman is seated in the fourth seat, separated only by a bit of wire mesh ten inches high, set on the back

[12] Gunnar Myrdal, *An American Dilemma*, 2 vols. (New York, 1944), p. 100ff. See also Part VIII, "Social Inequality".

[13] Myrdal, *supra*, footnote 6.

[14] *"Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional"* (1945), 33 Calif. Law Review 5, p. 27, n. 94.

See also Justice Harlan's dissent in *Plessy* v. *Ferguson*, 163 U. S. 537, in which he argued that the purpose of the Louisiana segregation statute then before the Court was to impress legal inferiority upon Negroes against whom the statute was directed. He said:

"It was said in argument that the Statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to whites. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for white and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary * * *" (p. 557).

"The destinies of the two races in this country are indissolubly linked together and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what can more certainly create and perpetuate a feeling of distrust between these races, than State enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana" (p. 560).

> of the third seat, there is a 'separation' that is merely a symbolic assertion of social superiority, a 'ceremonial' separation."

So completely is the inferior position of the Negro minority guaranteed by legal segregation that numerous Southern state courts have held that the word "Negro" or "colored person" when applied to a white person gives rise to a cause of action for defamation, a doctrine which has also been upheld by a federal court.

In *Stultz* v. *Cousins*, 242 F. 794 (C. C. A. 6th, 1917), it was held that a right of action for libel *per se* existed where a defendant published a false statement that the plaintiff was a man of "one-fourth" Negro blood. The court declared (p. 797):

> "Whatever be the rule as to spoken words, the authorities establish that the publication of a writing containing such a statement in respect to a white man is libelous *per se*, at least in a community in which marked social differences between the races are established by law and custom."

In *Flood* v. *News and Courier Co.*, 71 S. C. 112, 50 S. E. 637 (1905), a South Carolina court ruled that right to recovery resulting from a publication in a newspaper of a white man that he is a Negro was in no way affected by the adoption of the Thirteenth and Fourteenth Amendments. In sustaining its position the court argued at page 639:

> "When we think of the radical distinction subsisting between the white man and the black man, it must be apparent that to impute the condition of the Negro to a white man would affect his (the white man's) social status, and in case any one publish a white man to be a Negro, it would not only be galling to his pride, but would tend to interfere seriously with the social relation of the white man with his fellow white men."

And the Georgia court, in 1907, deciding the case of *Wolfe* v. *Georgia Railway Electric Co.*, 2 Ga. App. 499, 58 S. E. 899, took judicial notice of the fact that to call a white man a Negro, even in good faith or through an innocent mistake, constituted an actionable wrong. The court asserted at page 902:

> "It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic times denies equality."

Referring to the "intrinsic differences" between the races the court observed that these differences "are recognized in this state by the laws against intermarriage, by the laws for the separation of passengers by common carriers, separate schools, etc."

In a similar holding the highest court of Oklahoma declared in *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 184, P. 946, 947 (1919):

> "In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected insurmountable barriers between the races when viewed from a personal and social standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous *per se* to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy, or contempt, or bring him into more disrepute, than a charge of this character."

In *Anderson* v. *Pantages Theatre Co.*, 114 Wash. 24, 194 P. 813 (1921), where a Negro was ejected from a theatre upon refusal to sit in the balcony where he was assigned solely because of race, the Washington court in upholding recovery described the injury resulting from such discrimination as an "assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering are elements of actual damages for which an award is given" (p. 816).

Where white persons have been compelled to ride in Negro coaches the courts have deemed the humiliation and mortification so great as to warrant the award of damages. *Louisville and N. R. Co.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411 (1912); *Missouri K. & T. Ry. Co. of Texas* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago, R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 178 S. W. 401 (1915).

10. Discriminatory denial of equal governmental facilities is concededly a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The assignment of segregated facilities to a group because of its alleged or real social inferiority is similarly a denial of equal facilities and of the equal protection of the laws.

The leading case in the field, *Plessy* v. *Ferguson, supra*, decided in 1896, exactly a half century ago, accepts in substance the constitutional theory that segregation based on notions of inferiority is invalid. The court declared that "every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good *and not for the annoyance or oppression of a particular class*" (p. 550, italics added) and that, for instance, laws "requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color", would be clearly unconstitutional.

The court found, however, that the law requiring segregation on railroads was constitutional because it proceeded on the factual and sociological assumption that such segregation did "*not necessarily imply the inferiority of either race to the other*" (p. 544, italics added).

The court's basic finding reads as follows:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the *assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.* If this be so, it is not by reason of anything found in the act, but *solely because the colored race chooses to put that construction upon it.* The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption" (p. 551, italics added).

In short, the factual basis of *Plessy* v. *Ferguson* is: The "colored race chooses to put" the construction of inferiority upon the segregation statute. In that construction—the assumption that segregation is predicated on inferiority—"the white race * * * would not acquiesce". Will any court today, in the light of the sociological and psychological findings made in the last fifty years, prove so lacking in candor and so blind to realities as to subscribe to the fiction of benevolent segregation on which *Plessy* v. *Ferguson* relies? That is the issue. Not the legal doctrine of *Plessy* v. *Ferguson* is in question but the factual fallacy on which it rests. Once ascertained that the only real meaning of the distinction between Negroes and whites, Mexicans and Anglo-Saxons, is that of inferiority of one group to another—the legal consequences are not in question. The very doctrine of *Plessy* v. *Ferguson* calls for the outlawing of humiliating and discriminatory laws.

11. In addition to the foregoing considerations, the abolition of discrimination on account of race, creed, color has been now made a part of national policy by the ratification of international treaties to which the United States of America is a party. This national policy must override any contrary State law and custom in accordance with

Article VI, Clause 2 of the Constitution, which provides that "All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

The Charter of the United Nations has been duly signed by the President and ratified by the Senate of the United States. Under the provisions of this Charter the United States solemnly undertook together with the other signatories to promote freedom for all without distinction as to race, language or religion.

Thus, Article 55c of the Charter provides:

> "The United Nations shall promote * * * uniform respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion."

And in conjunction therewith Article 56 states:

> "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

Furthermore, the United States Government, as a participant of the Inter-American Conference on Problems of War and Peace and in connection with the signing of the Act of Chapultepec in Mexico City on March 6, 1945, joined with other nations in a resolution to recommend that their governments

> "make every effort to prevent in their respective countries *all acts which may provoke discrimination* among individuals because of race or religion" (italics added).

outlawing not only discrimination but also its *potential* causes. The formulation is certainly broad enough to cover *segregation.*

These declarations upon their execution bind the States as well as the federal government. *Baldwin* v. *Franks,*

120 U. S. 678 (1887); *Ware* v. *Hylton,* 3 Dall. (U. S.) 199 (1797); *Foster* v. *Neilson,* 2 Pet. (U. S.) 253 (1829).

Treaty provisions prevail over State enactments when the latter are inconsistent therewith. "That the treaty power of the United States extends to *all proper subjects of negotiation* between our government and the governments of other nations is clear," Field, J., in *Geofroy* v. *Riggs,* 133 U. S. 258, 266 (1890) (italics added). See also *Hauenstein* v. *Lynham,* 100 U. S. 483, 489 (1880); *Nielson* v. *Johnson,* 279 U. S. 47 (1929); *U. S.* v. *Pink,* 315 U. S. 203 (1942). The courts are bound to take judicial notice of treaty declarations and to enforce the rights of persons growing out of them. *U. S.* v. *Rauscher,* 119 U. S. 407, 419 (1886); *U. S.* v. *Belmont,* 301 U. S. 324 (1937).

Persuasive precedent is provided by the decision *Re Drummond Wren,* O. R. 778 (1945), decided by the Supreme Court of Ontario, October 31, 1945. In that case a restrictive covenant in a deed declaring that the lands involved were not to be sold "to Jews or persons of objectionable nationality" was held invalid as contrary to public policy. In determining the national policy which should govern the case, Judge Mackay relied heavily upon Sections 55c and 56 of the United Nations Charter, of which Canada was a signatory, as well as upon other international compacts and provincial statutes.

12. The theory advocated here does not mean that the federal government can, through the use of its treaty-power, invade every field of State activity. We do not say that "the United States has exactly the same range of power in making treaties that it would have if the States did not exist" (Corwin, "The Treaty Making Power," 199 North American Review (1914), 898). On the contrary we believe that, in order to fall within the supremacy clause provision a treaty should deal with "objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty" (Clifford, J., in *Holden* v. *Joy,* 17 Wall. 211, 242-243 (1872)), with

"proper subjects of [international] negotiation" (Field, J., in *Geofroy* v. *Riggs, supra*), with "subjects which properly pertain to our foreign relations" (Hughes, C. J., in *Santovincenzo* v. *Egan,* 284 U. S. 30, 40 (1931)).

While the international treaty making power of the United States of America has not changed since 1791 the content and nature of international relations have undergone considerable change. It would be, to put it mildly, unfortunate if the United States of America were unable to play a full role in the international relations of the modern world. "The advancement of an interest acknowledged to be of international concern may be regarded by the United States as well as by other States as necessitating restrictions upon the conduct of individuals who inhabit their respective territories in relation to activities which would appear normally to lack international significance and to possess a merely domestic aspect. Thus, matters of occupation, condition of labor, the production and manufacture, and even the transportation of particular articles may suddenly attain an international aspect and to become appropriate objectives of a treaty of the United States. *The constitutionality of the result is not affected by the circumstance that the federal agency is enabled through treaty making to accomplish what congress may remain impotent to achieve.*" Hyde, *International Law,* Vol. II, § 500 (italics added).

The problem in this case is thus whether or not the guarantee of human rights without discrimination is within the United States of America treaty power, whether or not the pertinent provisions of the United Nations Charter are constitutional and thus part of the "supreme law of the land".

The answer can hardly be doubted. The treaty involved is not one concluded casually between two nations. The United Nations representing the civilized international community were unanimous in believing that human rights are a matter of international concern, that individual freedom and international peace are inseparable, that a world

in which racial hatred, contempt, discrimination, segregation or other forms of interracial and inter-group humiliation continue to exist within the various nations is a world in which there can be no lasting peace among nations. In other words, what the United Nations did was not unlike the adoption of an International Fourteenth Amendment. Just as the people of the United States after the Civil War reached the conviction that the preservation of certain basic individual rights within the States was a matter of federal concern and a condition of the national peace, the United Nations after the Second World War reached the conclusion that the preservation of these rights is a condition of the international peace as well. We are sure that no American court will hold this finding unreasonable.

To achieve the dual ideal—of individual equality within, and of peace among the nations—much concerted effort on all levels of domestic and international life, will be needed. Modest as the problem of the relations among the Latin and Anglo-Saxon children of Orange County, California, may appear to a superficial observer, in reality that problem is in its nature not dissimilar from those confronting the world at large. The solution of these apparently "small" or "local" problems can have an important cumulative effect. History has assigned a great role and a great responsibility to the United States. Her courts cannot and will not refuse to play their part. Faithful to the traditions of judicial statesmanship they will accept their share of American responsibility.

POINT TWO

Whenever inhabitants of the United States are classified, for purposes of official action, according to their race, color, creed, national origin or ancestry, whether or not such classification is based on discriminatory social or legal notions of "inferiority" or "superiority" of the various groups, the very fact of official differentiation according to racial, religious or national criteria is an unreasonable and inadmissible classification and a violation of the Constitution of the United States and of treaties entered into under its authority.

1. The preceding discussion has proved, we submit, that the classification adopted by the Westminster School of Orange County and the ensuing segregation of children of Mexican or Latin descent represent a discriminatory and harmful denial of equality of treatment of these children. The present part of our argument aims to prove that, even if no discrimination against, and no harm to, the children of Mexican or Latin descent had been shown and even if the educational facilities enjoyed by them were in every sense "equal" to those enjoyed by the Anglo-Saxon group of children, nevertheless the classification adopted by the School District would be unconstitutional. In other words, we believe that compulsory segregation would be unconstitutional even in a supposed case of segregation of French from English children where no badge of inferiority could be imputed with respect to either group.

2. Generally speaking, the validity of a classification depends on whether or not the criteria of classification adopted by a legislature or administration are in fact relevant to the subject matter of official action, whether or not they bear a reasonable relation to its legitimate purpose. In some cases, however, this factual inquiry into the relevancy of a given classification may be unnecessary and

the criterion of classification may be outlawed or declared inadmissible or its irrelevancy may be presumed conclusively as a matter of law.

Such rule of total inadmissibility, put beyond the reach of factual appraisal of relevancy or reasonableness, has been expressly laid down in the Fifteenth Amendment with respect to the right to vote. Hence, any attempt to distinguish between the voting rights of different racial groups must be declared unconstitutional without any investigation as to the conceivable reasonableness of the rule under some particular circumstances. The same approach, we believe, must be adopted in other fields of legal regulation. We submit that under the present conception of the political relationship between the various racial, religious, national and ethnic groups comprising the American Commonwealth, attempts to base a legal regulation upon a distinction between these groups is in itself inconsistent with the basic principles of the Federal Constitution and a violation of its due process clauses. State action being involved in the present case, the violated provision is that of the Fourteenth Amendment.

Chief Justice Stone, speaking for a court unanimous on this point, said in *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943): "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

Mr. Murphy, in a concurring opinion, felt that racial distinctions based on color and ancestry "are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing

is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws" (pp. 110-111).

The Columbia Law Review, in commenting upon this case editorially, remarked:

> "Prohibition against racial discriminations has a meaning and a real function in society only if it is applied regardless of their alleged or actual relevancy. Reasonable men might indeed consider some racial discriminations relevant to many measures of various character. The objection to their validity is to be found in a political or moral philosophy which *presumes* their irrelevancy and places the principle beyond the factual appraisal by legislatures or courts. This presumption may be doctrinary and unrealistic, but it represents the very core of 'the doctrine of equality' upon which, in the words of the Court, the institutions of a free people are based" (43 Col. L. R. 951, 952).

To sum up, in the words of Justice Harlan, "Our Constitution is color blind". *Plessy* v. *Ferguson,* 163 U. S. 537, 559 (1896). A classification for purposes of governmental action, based on color, creed or nationality is, constitutionally speaking, a meaningless classification, and hence an unconstitutional one. Cf. *Gulf, Colorado & S. F. Ry.* v. *Ellis,* 165 U. S. 150, 165 (1897).

3. The political and sociological meaning of the doctrine of constitutional color-blindness we urge here consists in the fact that it is predicated—unlike the challenge on ground of discriminatory denials of equal protection—not on the damage to the victims of prejudice but on the harm done to our society at large. We urge the disregard of racial and religious differences *not for the sake of minorities alone.* Freedom and justice are indivisible. In reality the slave owner and the persecutor carry their share of the burden inherent in the system. In the words of Mr. Myrdal, *supra:*

> "Segregation and discrimination have had material effects on white, too. Booker T. Washington's famous remark, that the white man could not hold the Negro

> in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers. Throughout this book we have been forced to notice the low economic, political, legal, and moral standards of Southern whites—kept low because of discrimination against Negroes and because of obsession with the Negro problem. Even the ambition of Southern whites is stifled partly because, without rising far, it is so easy to remain 'superior' to the held-down Negroes. The Southern whites are tempted to remain on low levels of sexual morals, thrift, industriousness, reliability, punctuality, law observance and everything else" (V. 1, p. 644).

Nor is there dearth of evidence to support Myrdal's observations. As early as 1849, Mr. Charles Sumner, eminent attorney and later a member of Congress, argued in *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, that "separation of the schools, so far from being a benefit to both races, is an injury to both. It tends to create a feeling of degradation in the blacks, and of prejudice and uncharitableness in the whites".

More recently evidence has been gathered with respect to the felicitous results obtained in non-segregation schools. Thus, Frances Blascoer observed in *Colored School Children in New York,* 1915 (p. 10): "The law of New York State provides that there shall be no separation of races in the schools; and in those districts in which colored pupils have been attending school for years, the principal and teachers apparently have no 'color problem' in their minds. The majority of them * * * said that, so far as the school is concerned, the colored child presents the same problems as the white child."

Lloyd W. Warner in *New Haven Negroes,* New Haven, 1940, says (p. 277):

> "* * * children in New Haven are not taught color consciousness in the schools and develop it only slowly from outside influences. There is no discrimination in the New Haven public-school system * * *. There are colored children in four out of every seven schools

> in the city, and in none are they segregated by class, seat, or section. Reports indicate, also, that the white teachers make no distinction in their treatment of the two races * * *.
>
> "In many early grades, white and black children romp and learn together. Negroes compete without restraint or embarrassment * * * and, if proficient, are cheered and honored. They debate, sing, and act in dramatics, generally without discrimination."

Page 279:

> "There is no feeling of difference among fellow teachers, white or black. They entertain each other socially and make friends, eat, banquet, talk and play cards together. They are united against discrimination when it shows itself."

4. The prohibition of distinctions, whether or not discriminatory, based on race, language and religion, is also part of the United Nations Charter (Art. 55c).

It is earnestly urged that Article 55c of the United Nations Charter is intended to prevent not only *discriminations* but also mere "distinctions" as to race, color, language or religion from becoming operative through any State enactment or regulation which affects human rights or fundamental freedoms. Segregation founded solely upon racial or language grounds employs, to say the least, a rule of "*distinction* as to race, color, language or religion". In the instant case the distinction was made between "persons of Mexican ancestry" and "white persons" or between the Spanish and English speaking groups. Such distinction is therefore clearly within the Charter's prohibition even when accompanied by equal facilities.

The ratification of the Charter gives rise to an overriding federal policy which, according to Article 6 of the Constitution, is the supreme law of the land. The distinction based on nationality or language adopted by the appellant School District is thus a violation both of the Fourteenth Amendment and of Article VI of the Constitution read in connection with a duly ratified treaty.

POINT THREE

Segregation by official action of a State or its subdivisions of children of a more recent immigrant foreign language group from children of less recent immigrant English speaking groups of Americans is inconsistent with the basic purposes, policies and provisions of the federal naturalization laws and therefore an unconstitutional interference with a valid federal regulation.

Article I, paragraph 8, clause 4 of the United States Constitution delegates to the federal government the power "To establish a uniform rule of naturalization." No State law or custom can obstruct the legitimate exercise of this federal power or the implementation of the corresponding federal policies. *Chirac* v. *Chirac,* 2 Wheat. 259 (1817); *Scott* v. *Sandford,* 19 How. 393 (1857). The United States Supreme Court recently declared invalid a Virginia statute requiring segregation in interstate bus travel because it conflicted with federal policy in interstate commerce. *Morgan* v. *Virginia,* ..... U. S. ..... (1946), 66 S. Ct. 1050 (decided June 3, 1946). Any State law or regulation which conflicts with federal policy in the field of immigration and naturalization should be held unconstitutional *a fortiori.*

There is hardly an institution in American law and society which plays a more important role than that of naturalization. "We should not overlook the fact"—the Supreme Court of the United States has warned recently in a case concerned with naturalization—"that we are a heterogeneous people. In some of our larger cities a majority of the school children are the offsprings of parents only one generation, if that far, removed from the steerage of the immigrant ship, children of those who sought refuge in a new world from the cruelty and oppression of the old". Murphy, J., in *Schneiderman* v. *U. S.,* 320 U. S. 118, 120 (1943).

How can this "heterogeneous people" (*supra*) be shaped into a nation? How can "a country whose life blood came from an immigrant stream" (Black, J., speaking for a unanimous court in *Ex parte Kumezo Kawato,* 317 U. S. 69, at 73) become and remain a truly united country? How can children so close to "the steerage of an immigrant ship" become part and parcel of a commonwealth already rich in experience and traditions? In other words, how can the federal law prescribing so short a term for naturalization achieve its basic policy?

One of the answers to these questions is the existence of a school where children from heterogeneous backgrounds come together, study, live and work together and acquire in the formative years of their lives that mutual understanding and respect without which the existence of a free country is inconceivable. "In its administration of the naturalization law [the naturalization authorities rely on] the cooperation of the public school authorities throughout the United States" (Dept. of Justice, Immigration and Naturalization Service, Monthly Review, August, 1943, Vol. 1, p. 5).

Representative Adolph J. Sabath, speaking before a House Subcommittee on Immigration and Naturalization, 69th Congress (Second Session), February 17, 1927, described the process of Americanization in Chicago schools and emphasized the value of children of different national origins attending the same schools. He said:

> " * * * we have a great many schools and a great many high schools where the *children of different peoples, sometimes half a dozen different stocks and nationalities, attend the same school.* They show nothing but a friendly feeling toward one another, and that hatred that was born with their parents abroad has disappeared and they are all acting like and trying to become good American boys and girls and good American citizens" (p. 13, italics added, Hearing No. 69.25).

More recently the Department of Justice stated *inter alia* the following objectives of the naturalization policy:

> *"The Objectives of Human Relationship*—To establish and maintain a home in keeping with the principles

> of democracy; to bridge the gap between immigrant parents and their American born children; *to break down racial prejudice by associating with English-speaking people;* to participate in the social and cultural aspects of American life" (italics added; Dept. of Justice, Immigration and Naturalization Service, Monthly Rev., December, 1945, Vol. III, No. 6, pp. 233, 237).

We submit that the existence of schools in which children less far removed from the steerage of an immigrant ship, children with a foreign language background, are segregated by State action from children of the Anglo-Saxon, English speaking group is inconsistent with that policy of rapid and full adjustment of immigrants upon which the federal naturalization law, with its short residential requirement is predicated. Former Attorney General Biddle in a recent statement emphasized the necessity that an immigrant "when he becomes a member of our American society, presumably looking forward to the possibility of American citizenship, should have the benefit of the training and education best calculated to develop in him a sense of responsibility to the country of his choice". The federal government has engaged in a wide program aimed at the adjustment and "Americanization" of immigrants. In these efforts the government can have no more powerful allies than the immigrants' children. Throughout American history millions of immigrant parents have learned English, or a better English, from their children. Millions of grandparents have mastered the rudiments of the language to speak with their grandchildren. The "millions of immigrants who"—in the words of the Supreme Court—"have learned to love the country of their adoption more than the country of their birth" (*Ex parte Kumezo Kawato,* 317 U. S. at 73) did so mainly because they saw the children whom they had brought with them and those to whom they had given birth here were happy in the country of their adoption. When an immigrant father can say, be it in a broken English, "You could not tell my son from a real American", he truly becomes an American himself. It is in the happiness of his children that he fully realizes

the value of life free from that "fear * * * of further exile" (*Schneiderman* v. *U. S.,* 320 U. S. 118, 120) which the immigrants sought on these shores, the full value of American citizenship, "by many * * * regarded as the highest hope of civilized men" (*id.,* p. 122).

When, however, the immigrant children are treated as too "dirty" to be allowed in the same schools as "real", Anglo-Saxon Americans, when they are segregated and humiliated, hampered in their adjustment, made insecure and unhappy—the main presupposition of the optimistic federal law and policy is destroyed by a State action, which is arbitrary *per se* and inconsistent with the federal policy.

All discrimination is bad and humiliation of any human being because of his creed or language is unworthy of a free country. But none is so vicious as the humiliation of innocent, trusting children, American children full of faith in life. Their humiliation strikes at the very roots of the American Commonwealth. Their humiliation threatens the more perfect union which the Constitution seeks to achieve.

It is the awareness of that danger and the desire to counteract it that has prompted the submission of this brief.

Respectfully submitted,

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October, 1946

> of democracy; to bridge the gap between immigrant parents and their American born children; *to break down racial prejudice by associating with English-speaking people;* to participate in the social and cultural aspects of American life" (italics added; Dept. of Justice, Immigration and Naturalization Service, Monthly Rev., December, 1945, Vol. III, No. 6, pp. 233, 237).

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The Hecla Press : : New York City
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